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In The

Supreme Court of the United States

October Term, 1984

FORTUNE S. MACRI,

Petitioner,

vs.

GRIEVANCE COMMITTEE FOR
THE NINTH JUDICIAL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Respondent' s brief is submitted in opposition to the petition for a writ of certiorari, pursuant to the denial by order dated September 13, 1984 of the New York Court of Appeals to grant leave to appeal, *Matter of Macri*, 63 N.Y. 2d 605 (1984) from the order of the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York, which on June 4, 1984 disbarred petitioner. *Matter of Macri*, 102 A.D. 2d 53 (Second Dept. 1984).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court, essentially under Title 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

In disbarring petitioner, Fortune S. Macri, after extensive hearings, pursuant to order dated June 4, 1984, the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York which had the benefit of the entire record to review fully, sustained the report of the Special Referee it had assigned to hear and report.

Petitioner was found guilty of six of the thirteen charges of professional misconduct that had been lodged against him, including conversion and failure to account for at least $54,000 of funds from the Estate of Frances Myrick, which petitioner had been handling (Charges Ten and Eleven), perpetrating a fraud upon a tribunal and upon an adversary attorney (Charge Three), commingling funds (Charge Four), failing to maintain a ledger book or similar record for his attorney escrow account (Charge Five), and of failing to cooperate with the respondent, Grievance Committee for the Ninth Judicial District of New York in its investigation (Charge Nine).

Petitioner's motion for leave to appeal to the New York Court of Appeals was thereafter denied. *Matter of Macri*, 63 N.Y. 2d 605 (1984).

ARGUMENT

I.

Petitioner was accorded due process.

The claim by petitioner that probable cause was lacking in the institution of the disciplinary proceeding against him, is frivolous indeed.

Section 691.4(a)(d)(f) of the New York Appellate Division, Second Department's Rules Governing the Conduct of Attorneys provides:

> §691. 4. Appointment of Grievance Committees; Commencement of Investigation of Attorney Misconduct: Complaints; Procedure
>
> (a) This court shall appoint three grievance committees for the Second Judicial Department. One of these grievance committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the second and eleventh judicial districts at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the ninth judicial district at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided

in the tenth judicial district at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom this Part applies pursuant to section 691.1 of this Part.

* * *

(d) Each grievance committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairman of the committee shall designate a member of the subcommittee to act as its chairman. Such subcommittees may hold hearings as hereinafter authorized.

(e) *Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee:*

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the attorney and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing the attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which

has been violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivision (f) of this section;

(5) *forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action.*

(f) Except as otherwise provided in paragraph (5) of subdivision (e) of this section, if, after preliminary investigation, the committee shall deem a matter of sufficient importance, written charges predicated thereon, plainly stating the matter or matters charged, together with a notice of not less than 20 days, shall be served upon the person concerned, either personally, by certified mail, or in such other manner as the committee may direct. The person so served shall file a written answer at the time and place designated in the notice and the committee or a subcommittee shall proceed to hold a hearing of the case. The person concerned (hereinafter referred to as the respondent) may be represented and assisted by counsel. The committee or subcommittee shall decide all questions of evidence. Stenographic minutes of the hearing shall be kept.

(Emphasis supplied) (22 N.Y.C.R.R. 691.4).

In this matter, respondent conducted an extensive investigation, in which, *inter alia,* petitioner was questioned under

oath in the presence of his then counsel. Among other things, petitioner admitted during the course of his deposition, that he commingled funds. Based on a confidential report filed with the Appellate Division, Second Department, the disciplinary proceeding was authorized by order dated June 4, 1982. Petitioner cites the failure of the Appellate Division to sustain the conversion charge in the Naclerio matter (Charge One) as a basis for his vacuous claim that probable cause was not established to institute the disciplinary proceeding. What he fails to note, however, is that included in the original petition of charges filed against him, were charges which were sustained among others that he perpetrated a fraud upon a tribunal and an adversary attorney (Charge Three), commingled funds (Charge Four), and failed to maintain a ledger book or similar record for his attorney escrow account, as required by the Rules of the Appellate Division, Second Department (Charge Five).

These circumstances were all before the respondent, Grievance Committee for the Ninth Judicial District at the time of its filing of the aforesaid confidential report with the Appellate Division, Second Department, thereby fully satisfying the requirements for dispensing with an investigatory hearing before respondent since probable cause clearly existed for such action. In view of the egregious misconduct, prompt action was required.

Further, the alleged Naclerio conversion (Charge One) in the initial petition brought against petitioner was based on facts and case law which decidedly justified the charge.

During the course of petitioner's representation of Mr. Naclerio, a stipulation was entered into between Mr. and Mrs. Naclerio dated December 21, 1977. The terms of the stipulation, required petitioner to hold $30,000 in his escrow account pending the entry of a judgment of divorce and receipt of a certified copy of said judgment ending the marriage. The sum of $30,000 was

deposited into petitioner's escrow account at the Manufacturers Hanover Trust Company on February 28, 1978.

Petitioner had no authority at any time from Mrs. Naclerio to withdraw the aforementioned escrow funds, but as early as April 1978 his escrow account dropped below the $30,000 he was required to be holding as a result of the alleged conversion of the funds entrusted to him. Thereafter and until April 1981, when Mrs. Naclerio was paid the money owed her, petitioner's escrow account repeatedly reflected that there had been overdrafts as a result of his conversion of said funds. Petitioner sought to excuse his behavior by claiming that his client, Raymond Naclerio, gave permission for him to withdraw the money after Mrs. Naclerio allegedly breached the December 21, 1977 stipulation.

In addition to the applicable provisions of the Lawyer's Code of Professional Responsibility, respondent relied upon the cases cited *infra*, among others in concluding that petitioner had converted the $30,000 Naclerio fund. Accordingly, the charges were brought which included the alleged fraud upon a tribunal (Charge Three), commingling of funds allegation (Charge Four) and failure to maintain a ledger book or similar record (Charge Five) all of which, as set forth above, were sustained by the Special Referee and ultimately the Appellate Division.

In *Shuman v. Conforti*, 30 A.D. 2d 968 (Second Dept. 1968), *aff'd.*, 26 N.Y. 2d 755 (1970), the Appellate Division, Second Department stated that a premature disbursement of the escrow fund is incompatible with an escrow agent's ". . . obligation as an impartial trustee of the escrow fund." Also, in *Farago v. Burke*, 262 N.Y. 229 (1933), the Court of Appeals of the State of New York held that a duty is imposed on the depository of escrow as a trustee for both parties, ". . . not to deliver the escrow to anyone except upon strict compliance with the conditions imposed. . . ."

A court order authorizing the release of the $30,000 was never issued. Also, on or about November 14, 1980, petitioner appeared in the Supreme Court of the State of New York, Bronx County, before the Hon. Irwin M. Silbowitz in the *Naclerio v. Naclerio* action. In attendance were the plaintiff and defendant, Lydia and Raymond Naclerio, and the wife's then attorney, Daniel K. Ettinger, Esq. At that time, petitioner read a stipulation into the record in which he falsely represented that the $30,000 was being held in escrow by him when, in fact, the balance in his escrow account at the time was only $37.75.

Charge Three of the petition which alleged that petitioner had been guilty of conduct which is prejudicial to the administration of justice and which constitutes fraud, deceit and misrepresentation upon a tribunal and upon an adversary attorney was, as set forth above, thereafter sustained by the Special Referee and confirmed by the Appellate Division, Second Judicial Department.

It can certainly be speculated that as to the alleged Naclerio conversion that the Appellate Division, Second Department would have disaffirmed the findings of the Special Referee and sustained the conversion charge, but for the fact that the seriousness of this matter was diminished in light of the charges sustained concerning the conversion of at least $54,000 of funds from the Myrick estate which virtually required petitioner's ultimate disbarment.

An attorney who is the subject of a disciplinary proceeding which could potentially lead to his disbarment is entitled to procedural due process, including fair notice of the charge. *In re Ruffalo,* 390 U.S. 544 (1968).

In the case at bar, petitioner does not dispute that he was given notice of all the charges. Nor does he take issue with the

fact that he had a full and fair hearing before the Special Referee, including nine days of evidentiary hearings between December 1982 and July 28, 1983. In fact, he does not once dispute that the charges sustained were established by the evidence.

During the course of the hearings, petitioner repeatedly advised that he would repay the Myrick estate. Further, a representation was even made approximately at the time of the conclusion of the hearings in July 1983, that petitioner's counsel was holding about $20,000 in escrow deposited there by petitioner towards repayment of the Myrick estate.

However, to date petitioner has repaid not one penny of the funds converted from the Myrick estate, which the Special Referee found as described above was at least $54,000. In fact there was evidence during the hearing that petitioner may have converted as much as $88,000 from the Myrick estate.

As a result of petitioner's conversion and embezzlement, the New York Clients' Security Fund had no alternative but to make its maximum award of $25,000 to the Myrick estate.

Tragically, however, the estate has not nearly been made whole and has little hope of recovering the excess funds stolen by petitioner.

It is a matter of public record that as a result of this theft, petitioner currently is under indictment in Westchester County in the State of New York for Grand Larceny in the Second Degree, a Class D Felony under N.Y. Penal Law §155.35. The conviction of such felony under N.Y. Judiciary Law §90(4) would result in automatic disbarment for an attorney.

Indeed, petitioner who does not even take issue with the charges of gross professional misconduct sustained by the

Appellate Division, and his ilk are the very reason attorney grievance committees have become so essential.

Finally, petitioner's claim that virtually no hearings are held by respondent under Rule 691.4 (22 N.Y.C.R.R. 691.4) is absolutely false. In fact, hearings are held in all appropriate cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY L. CASELLA
Attorney for Respondent